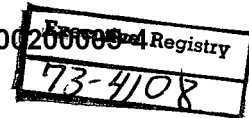




Office of the Attorney General
Washington, D. C.



DD/M&S 73-2936

July 11 , 1973

MEMORANDUM TO HEADS OF ALL
FEDERAL DEPARTMENTS AND AGENCIES

Re: Coordination of Certain Administrative
Matters under the Freedom of Information
Act, 5 U.S.C. 552. 1/

A matter of government-wide importance, and increasing interest in Congress, is the need for improved administration of the Freedom of Information Act. In this memorandum I wish to bring you up to date on several actions which the Justice Department is taking (Part I), and to request your assistance on one of these actions (Part II).

1/ The Freedom of Information Act provides for the compulsory disclosure upon the request of "any person" of all agency records not exempted by the Act, confers administrative responsibility on each agency with respect to its own records, and makes the agency's final decisions subject to judicial review, in which the agency has the burden of justifying denials of access. The Department of Justice conducts litigation in defense of agency determinations under the Act and furnishes certain advisory and other services. Most of the Department's litigation functions in this area are conducted by the Civil Division, and the advisory and other functions are conducted by the Office of Legal Counsel.

I.

On June 26, 1973 I testified before three Senate subcommittees holding joint hearings on various bills pertaining to the general subject of government secrecy. A major portion of my testimony was directed toward S. 1142, a bill to amend the Freedom of Information Act. A companion House bill, H.R. 5425, had been the subject of hearings on May 8th, at which we were asked to testify on behalf of the Administration and opposed most of the proposed amendments.

During my June 26th testimony, while reiterating our opposition to most of the proposed amendments, I gave major emphasis to our determination to act on the well-publicized and recurrent problems of inadequate disclosure which stimulate such proposals, stating that "the real need is not to revise the Act extensively but to improve compliance." After summarizing some of the causes of less-than-ideal compliance and some of the means we are considering to upgrade it, I announced four steps which the Justice Department will take immediately, as follows:

"First, we will request the Civil Service Commission to include Freedom of Information material in its executive training and legal training programs and to assist us in arranging

for inclusion of similar material in other programs for training government personnel.

"Second, we will conduct an interagency symposium on the Freedom of Information Act before the end of this year, to emphasize the need for improved administration and to provide the wider sharing of problems and ideas. This symposium will involve two-way communications as well as direct presentations, and we plan to invite the participation of Congressional and private speakers.

"Third, we will promptly institute discussions with the Administrative Conference of the United States, the Civil Service Commission, the Office of Management and Budget, and perhaps other agencies, seeking their assistance in launching a comprehensive study of how the Executive Branch can better organize itself to administer the Act, both within and among the agencies. This study will cover staffing, budgeting, training, and meeting the need for research in the application of the Act to major areas like government procurement, regulatory programs, law enforcement, and computerized records. It will cover the extent to which desirable improvements should be effected by legislation, executive order, or departmental orders. It will take account of inputs from outside the Executive Branch, and it is designed to point the way to sound and relatively permanent improvements, including greater speed of processing, greater uniformity, and greater disclosure. Our objective will be to have this study launched within 90 days and completed within one year, with reports to be furnished to Congress.

"Fourth, I will immediately remind all federal agencies of this Department's standing request that they consult our Freedom of Information Committee before issuing final denials of requests under the

Act. In this connection I will order our litigating divisions not to defend freedom of information law suits against the agencies unless the Committee has been consulted. And I will instruct the Committee to make every possible effort to advance the objective of the fullest responsible disclosure."

II.

We wish to implement the fourth action set forth above with the maximum understanding and the least friction possible. There is a major need for closer coordination in the freedom of information field, and it is the responsibility of the Department of Justice to provide that coordination.

Your attention is invited to our standing request on this subject, originally set forth in this Department's December 8, 1969 memorandum to the general counsels of all federal departments and agencies, as follows:

"We request that in the future you consult this Department before your agency issues a final denial of a request under the Freedom of Information Act if there is any substantial possibility that such denial might lead to a court decision adversely affecting the government. Such consultation . . . may also enable us to assist you in reaching a disposition of the matter reasonably satisfactory both to your agency and to the person making the request."

In this 1969 memorandum, the Department also announced the establishment and initial membership of a committee of lawyers in the Office of Legal Counsel and the Civil Division, now known as the Freedom of Information Committee, to conduct

such consultations. 2/ Up to the present, the Committee has conducted more than 200 consultations with agencies, and its work has been conducted with speed and informality. 3/

We would very much appreciate it if you would arrange to make sure that the appropriate persons within your agency are aware of our standing request, as just discussed. In addition, it would be most helpful to the overall government objective of the fullest responsible disclosure if your agency could make special provisions, if none now exist, for speedy and careful review at the highest agency level in any cases in which officials of your agency, after consulting the

2/ The current membership of the Committee is Robert L. Saloschin, ext. 2674, chairman, John Gallinger, ext. 2038, and Deputy Assistant Attorney General Leon Ulman, ext. 2051, chairman ex officio, all of the Office of Legal Counsel, and Jeffrey Axelrad, ext. 3300 and Walter Fleischer, ext. 3354, both of the Civil Division. The Committee maintains cooperative arrangements with the Tax Division, which handles litigation under the Act involving Internal Revenue Service records, under which that Division screens proposed final denials of such records and refers them to the Committee in cases of doubt which may affect agencies in addition to the Service.

3/ For a brief description of the work of the Committee by its chairman, see 23 Admin. Law Rev. 147. For a recent discussion of its work, see House Report No. 92-1419 on the Administration of the Freedom of Information Act (the "Moorhead Report") of September 20, 1972 at pp. 66-69.

Committee and receiving advice to the contrary, adhere to an intention of issuing a final denial.

Please feel free to call us if you have any questions about the foregoing. We hope that through the procedures and actions mentioned in this memorandum, and through exchanges of experience and views on problems of common interest, the administration of the Act can be steadily and significantly improved, to the ultimate benefit of each agency, the entire government, and the public.

Elliot L. Richardson

Elliot L. Richardson
Attorney General

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

Reply to the
as Indicated
Initials and Number

December 8, 1969 -

MEMORANDUM TO GENERAL COUNSELS OF
ALL FEDERAL DEPARTMENTS AND AGENCIES

Re: Coordination of Certain Administrative
Matters under the Freedom of Information
Act, 5 U.S.C. 552.

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UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

December 8, 1969

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MEMORANDUM TO GENERAL COUNSELS OF
ALL FEDERAL DEPARTMENTS AND AGENCIES

Re: Coordination of Certain Administrative
Matters under the Freedom of Information
Act, 5 U.S.C. 552.

The Freedom of Information Act, providing for compulsory disclosure of agency records not exempted by the Act, confers administrative responsibility on each agency and makes the agency's final decisions subject to judicial review. The Department of Justice conducts litigation in defense of agency determinations under the Act and furnishes certain advisory and other services pertaining to Freedom of Information problems. In general, the Department's litigation functions in this area are conducted by the Civil Division, and the advisory and other functions are conducted by the Office of Legal Counsel.

In discharging these functions, the Department has noted several developments which we believe warrant your

attention. First, the government in recent months has lost cases in court which involved a number of the exemptions contained in the Act. Consumers Union v. Veterans Administration, 301 F. Supp. 796 (S.D.N.Y. July 10, 1969) (involving exemptions 2, 3, 4 and 5); General Services Administration v. Benson, 415 F. 2d 878 (9th Cir. Aug. 26, 1969) (exemptions 4 and 5). Second, there has been considerable variation in agency practices with respect to consulting the Department on Freedom of Information controversies before the agency takes final action which may result in the filing of suit against the agency. Third, there are particular problem areas under the Act which are common to a number of agencies, where an exchange of views may be beneficial.

The implications of the judicial decisions cited above, as well as other cases, are under continuing review in the Department. However, enough review has already been accomplished to point to two conclusions: (1) Although the legal basis for denying a particular request under the Act may seem quite strong to an agency at the time it

else, finally to refuse access to the requested records, the justification may appear considerably less strong when later viewed, in the context of adversary litigation, from the detached perspective of a court and from the standpoint of the broad public policy of the Act; (2) An agency denial leading to litigation and a possible adverse judicial decision may well have effects going beyond the operations and programs of the agency involved, insofar as it creates a precedent affecting other departments and agencies in the Executive Branch.

In view of the foregoing, it seems manifestly desirable that, in most instances, litigation should be avoided if reasonably practicable where the government's prospects for success are subject to serious question. This can often best be done if, before a final agency rejection of a request has committed both sides to conflicting positions, the matter is given a timely and careful review, in terms of litigation risks, government-wide implications, and the policy of the Act, as well as the agency's own interests. To facilitate review of the nature just described, we need your cooperation. To

improve cooperation on our part, we have just established an informal committee of representatives of the Civil Division and of the Office of Legal Counsel.^{1/} The functions of this committee will be to assist in such review and help assure closer coordination in our work.

We request that in the future you consult this Department before your agency issues a final denial of a request under the Freedom of Information Act if there is any substantial possibility that such denial might lead to a court decision adversely affecting the government. Such consultation will serve the review function discussed above, and in some instances may also enable us to assist you in reaching a disposition of the matter reasonably satisfactory both to your agency and to the person making the request. The requested consultation may be undertaken

^{1/} The members of this committee as of now are: Jeffrey F. Axelrad, Civil Div., ext. 3300; Robert V. Zener, Civil Div., ext. 3354; Steven P. Lockman, Office of Legal Counsel, ext. 2039; and Robert L. Saloschin, Office of Legal Counsel, ext. 2674, chairman. Deputy Assistant Attorney General Thomas E. Kauper, Office of Legal Counsel, ext. 2051, will be chairman ex officio.

formally or informally as you prefer, and ordinarily should be directed initially to the Office of Legal Counsel rather than to the Civil Division.

As regards the third development under the Act noted near the beginning of this memorandum -- the emergence of certain problem areas common to several agencies on which exchanges of view and experience may be mutually beneficial -- there is one such area warranting mention at this time. This area consists of various questions as to the availability of information on the testing of manufactured and other products (including such items of information as the identity of the maker or supplier, brand names, models, generic descriptions, test criteria, test procedures, test results, comparative ratings, limitations pertaining to products or characteristics not tested, etc.). If the activities of your agency involve testing or information pertaining thereto, we would welcome any statements of experience, policies or views which you may care to provide. Such statements may prove use-

ful to other agencies engaged in similar activities and to this Department in representing or counseling such agencies.

It is our hope that through the consultation and review procedures outlined above and through exchanges of experience and views on problems of common interest, positive benefits will accrue to individual agencies, the government as a whole, and the public. . .

Please feel free to call us if you have any questions about the foregoing.



William H. Rehnquist
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